No. 15-1672

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

v.

AMERICAN EXPRESS CO., *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
(HONORABLE NICHOLAS G. GARAUFIS)

OPPOSITION OF PLAINTIFFS-APPELLEES TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

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PRELIMINARY STATEMENT

This antitrust enforcement action challenges provisions in American Express's contracts that bar roughly 3.4 million merchants from offering a discount or expressing a preference for another credit card. Following voluminous discovery and a seven-week bench trial, the district court concluded that these nondiscrimination provisions (NDPs) unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, causing "actual anticompetitive effects on interbrand competition." Op. 6.[1] The court found that the NDPs stifle price competition at the point of sale among credit and charge card networks, block the success of lower-cost card networks, raise merchant costs and retail prices, and impede innovation. *Id.* at 98-116. The court correctly recognized that "the law does not permit [Amex] to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." *Id.* at 136. Accordingly, the court enjoined Amex from enforcing the NDPs. Injunction § IV.

This Court should deny the requested stay. Amex does not have a strong chance of prevailing on appeal. The district court's liability decision is well-reasoned and amply supported by the extensive factual record. And, as the district court found, any "harm that [Amex] may sustain absent a stay" is "outweighed by

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[1] A copy of the district court's liability opinion ("Op."), the permanent injunction ("Injunction"), the district court's opinion denying the stay ("Stay Op."), and cited transcript excerpts ("Tr.") are attached as exhibits to the declaration of Craig W. Conrath.

the significant, continued harm to merchants and to other members of the public that would be caused by Amex's unabated enforcement of the NDPs during the pendency of its anticipated appeal." Stay Op. 2-3, 9.

BACKGROUND

1. There are four general purpose credit and charge card (GPCC) networks: Visa (with 45% of U.S. charge volume), Amex (26.4%), MasterCard (23.3%), and Discover (5.3%). Op. 67. When a customer uses a GPCC card, the merchant must pay a fee, usually "a percentage discount rate multiplied by the purchase price." *Id.* at 15. These "card fees represent a significant cost for many merchants," *id.* at 118, totaling over $50 billion annually in the United States.

Amex's card fees have "tended to be greater than the cost of accepting other cards," *id.* at 3-4, and remained higher as of 2013 "on a mix-adjusted basis" controlling for the different types of rivals' cards. *Id.* at 86. A merchant normally would try "to influence their customers' payment decisions"—i.e., use some form of steering—to "shift spending to less expensive cards." *Id.* at 98. But the 3.4 million merchants accepting Amex cards cannot do so because of the NDPs. While NDPs have existed in some form since the 1950s, Amex tightened them in the late 1980s and early 1990s. *Id.* at 23. At that time, Visa started using a Profit Improvement Calculator showing merchants how much they would save by switching from Amex (1.75% v. 3.25%), and Visa's "We Prefer Visa" campaign

was "remarkably effective" in shifting sales away from Amex. *Id.* at 22-24, 104-05; Mot. Ex. 10 (PX0132) at '880. Instead of reducing its fees, Amex's "primary response" to this competition was "to bolster its contractual restraints on merchants in order to stifle any further steering or preference campaigns." Op. 105.

The NDPs provide that a merchant may not "indicate or imply that [it] prefer[s], directly or indirectly, any Other Payment Products over [Amex's] Card" or "try to persuade or prompt [customers] to use any Other Payment Products" (among other things). *Id.* at 25-26. Thus, a merchant may not offer a "discount" for use of a particular card or "any other non-monetary incentive" like a dedicated checkout lane. *Id.* at 29-30. Nor may merchants post signs "signaling a preference" for a non-Amex card or disclosing the costs of accepting particular cards, "even if such information is accurate and truthful." *Id.* The NDPs, in fact, limit competition among the other three GPCC networks because Amex prohibits merchants accepting its card from steering even if a customer intends to use another card. *Id.* at 30. Over 3 million merchants are bound by the NDPs, and "the vast majority" of the remaining merchants "are very small." *Id.* at 124.

2. Following a seven-week trial with over thirty fact witnesses, four expert witnesses, and over 1,000 exhibits, the district court conducted a full rule-of-reason analysis of the NDPs. It concluded that Plaintiffs had proved in two "independent" ways that the NDPs were anticompetitive: "indirectly" by showing Amex had

sufficient market power to harm competition "and that there are 'other grounds to believe that the defendant's behavior will harm competition market-wide'"; and "directly" by proving the NDPs had actual anticompetitive effects. Op. 35-36.

The court found "that the relevant market for the purpose of [its] antitrust analysis" is GPCC network services in the United States. Op. 38. The court recognized, like this Court did in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-40 (2d Cir. 2003), that the network services market was "interrelated [to], but separate" from the market for issuing cards. Op. 41. The court rejected Amex's attempt to "collapse" the distinct markets for network services and for card issuance into a single "transactions" market, finding that such a market would "confuse market realities." Op. 41-42. The court acknowledged that GPCC networks "serve as two-sided [platforms that act as] intermediaries between merchants and their cardholding customers," *id.* at 11, but held that Plaintiffs properly "accounted for the two-sided features at play in this system" in establishing the validity of the network services market. *Id.* at 48-49.

Following the "roadmap" in *Visa*, the district court found that Amex had sufficient market power to harm competition in the network services market. *Id.* at 66-67. Amex had a 26.4% "market share in a highly concentrated market with high barriers to entry." *Id.* This share equaled MasterCard's share of the network services market in *Visa*, where this Court held that it had market power. *Id.* at 67.

Critically, cardholder "insistence" gives Amex "uncommon leverage" when negotiating with merchants, and so even large merchants could not plausibly threaten to stop accepting it. *Id.* at 66-67, 73 & n.27, 76; *id.* at 76 (Walgreens tried and failed). Additional "compelling evidence" of Amex's market power was that, "between 2005 and 2010, [it] repeatedly and profitably raised its discount rates to millions of merchants" without "meaningful merchant attrition." *Id.* at 66, 78.

The court found that the NDPs had actual anticompetitive effects. First, "the NDPs reduce [Amex's] incentive—as well as those of Visa, MasterCard, and Discover—to offer merchants lower [fees]" and thus "impede a significant avenue of horizontal interbrand competition." *Id.* at 98. The result, Amex itself recognized, is that no one's "business strategy is to be cheaper than the next guy." *Id.* at 102-03 (quoting Tr. 2667:22-2668:8). Second, the NDPs blocked the development of a low-price GPCC network business model. Discover "pursued [a] low-price strategy" to get merchants to switch, but failed because of NDPs, and raised its prices so as not to "leav[e] money on the table." *Id.* at 108-10 (quoting Tr. 854:10-11). Third, the NDPs raised merchant costs and retail prices "to all customers," not just credit and charge card users. *Id.* at 99, 111-14. Fourth, the NDPs stifled innovation by impeding the development of low-cost payment platforms. *Id.* at 116. The court rejected Amex's contention that "the NDPs drive interbrand competition in the credit card industry," finding it "inconsistent with both the law

and the factual record." *Id.* at 131-32.

The court enjoined Amex from enforcing the NDPs to prevent merchant steering but did not require any specific contractual changes. Injunction §§ III-IV. The court also required Amex to notify merchants that they could steer and to designate an officer to monitor compliance with the injunction. *Id.* § IV.C.

3. The district court denied Amex's motion for a stay pending appeal. It held that Amex did not raise any serious questions going to the merits. Even if the court had accepted Amex's arguments as to how the rule of reason should be applied, it "determined as a factual matter" that it "would not lead to a different result." Stay Op. 5-6. Moreover, several of Amex's arguments just "quarrel with the court's factual findings." *Id.* at 7-8. The court rejected the argument that a stay should be granted because one was issued in *Visa*, noting that unlike the *Visa* district court, it had "the benefit of a recent decision from the Second Circuit concerning antitrust liability in the GPCC industry," and "a number of [its] findings of fact were based upon credibility determinations." *Id.* at 9 & n.6 (citing Op. 88).

The court further found that, while Amex "could suffer some economic harm due to merchant steering during the pendency of the appeal," that harm could be mitigated. *Id.* at 13. It also found that a stay would cause "significant, continued harm to merchants and to other members of the public," *id.* at 3, and that "the public interest favors enjoining Amex's unlawful practices now." *Id.* at 15-17.

ARGUMENT

A "stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). This Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012).

A stay is not warranted here. Amex is mistaken in claiming that the district court legally erred. It applied settled principles of antitrust law, and its conclusion that the NDPs violate the Sherman Act follow directly from factual findings subject to clear error review. In such circumstances, a stay movant has a heavy burden in showing a likelihood of success on appeal. *Cf. Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (a stay movant has "greater difficulty in demonstrating a likelihood of success" than in the preliminary injunction context, because "there is a reduced probability of error, at least with respect to a court's findings of fact"). Moreover, the balance of equities weighs against a stay because Amex's claims of irreparable harm are speculative and unsubstantiated, while the harm to merchants and the public from a stay is clear from the record.

I. Amex Is Not Likely to Succeed on Appeal

Amex has not made a "strong showing" that it is likely to succeed on appeal. *Citigroup*, 673 F.3d at 162. Amex claims that the district court "fundamental[ly]" erred by holding that Plaintiffs met their initial burden under the rule of reason in showing only anticompetitive harm to merchants. Mot. 10. Amex is wrong.

1. Under the rule of reason, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984). The "factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Under this Court's burden-shifting approach, "plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted and emphasis omitted).

The district court properly held that Plaintiffs satisfied this initial burden by applying settled antitrust principles to the extensive factual record. First, the court found that GPCC network services is the relevant market based on "the hypothetical monopolist" test, which has "been used routinely by courts in the Second Circuit." Op. 47 (citing, *e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d

Cir. 2001)). The reason, it explained, is that a "hypothetical monopolist" of GPCC network services could profitably impose a "small but significant and non-transitory price increase" on the "relevant consumer," the merchants (with no change in the price to cardholders), because few would cease accepting GPCC cards. Op. 47-53. The court also found this market supported by "a pragmatic, factual approach" to market definition, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962), as the "competitive realities" of the industry established a network services market. Op. 53-61. The court noted that this Court upheld the "network services market for general purpose cards" in *Visa*, affirming the district court's finding that "there are no products reasonably interchangeable . . . with the network services provided by the four major brands." *Id.* at 41; 344 F.3d at 238-39.

Then, extensively analyzing competition in the network services market, the district court found that the NDPs cause numerous "actual anticompetitive effects on interbrand competition," including higher merchant fees marketwide. Op. 6, 98-116. Thus, consistent with this Court's precedent, Plaintiffs made out a *prima facie* case. *See, e.g.*, *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98, 104 (2d Cir. 2010); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008). Accordingly, the burden properly shifted to Amex "to offer evidence of the pro-competitive effects of the[] agreement." *Geneva Pharmaceuticals*, 386 F.3d at 507.

Amex argues that, because the GPCC platform has two sides, proof of harm to merchants does not make out a *prima facie* case. In such a platform, it claims, Plaintiffs cannot carry their initial burden without also proving that any anticompetitive effects on merchants outweigh potential benefits to cardholders. Mot. 10-11. But as the district court noted, this "is not the first [case] to confront antitrust liability in a complex or two-sided market." Stay Op. 6 n.3; *see, e.g.*, *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953) ("every newspaper is a dual trader in separate though interdependent markets"). Yet no cases have previously applied such an additional proof requirement at the initial stage of the rule-of-reason analysis.

Amex's argument amounts to an attack on the relevant market within which the district court analyzed the competitive effects of the NDPs. In its view, the district court should not have found that GPCC network services is the relevant market, but instead should have defined a single "transactions" market composed of both GPCC network services and GPCC card issuance. Mot. 12 (attacking the district court's "insistence on segregating and then ignoring the full impact of NDPs on cardholders"). But "market definition is a deeply fact-intensive inquiry," *Todd*, 275 F.3d at 199-200, subject to clear error review. *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006). And Amex identifies no clear error in the district court's finding that GPCC network services is the relevant market.

In any event, the district court also found that adopting Amex's "proposed novel form of antitrust analysis would not lead to a different result." Stay Op. 6; *see* Op. 91-93, 127-41. Amex suggests the court erred because its high fees and rewards are linked on a dollar-for-dollar basis. Mot. 5, 10. But the district court found that Amex's increases in merchant fees "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price." Op. 112. Moreover, the record shows that GPCC networks could offer both low fees to merchants and attractive rewards to cardholders. Discover tried to do just that, providing a "breakthrough value proposition for consumers" and merchants alike, Tr. 821:11-16, but NDPs prevented its success. Op. 108-10. As its president testified, without Amex's NDPs, it would "work hard to be the lower-priced network that merchants prefer to use," Tr. 842:1-3, while offering "competitive rewards" to cardholders, Tr. 873:9-11. "[B]y operating very efficiently we could offer a good value proposition to our merchants customers on one side and a good proposition to our cardholders on the other side." Tr. 821:25-822:5. Indeed, the evidence showed that Amex may respond to increased competition by increasing rewards. Op. 139-40.

Even if eliminating the NDPs would require Amex to choose among lowering fees, reducing rewards, and accepting lower profits, that would not render the NDPs lawful. The antitrust laws were enacted for "the protection of *competition*,

not *competitors*." *Brown Shoe*, 370 U.S. at 320; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (a "hold[ing] that the antitrust laws protect competitors from the loss of profits due to . . . price competition" would be a "perverse result"). Amex does not have the right to "decide on behalf of the entire market which legitimate forms of interbrand competition should be available." Op. 136 (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); and *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990)).

2. Amex also suggests that the rule of reason applies differently because the NDPs are vertical restraints. Mot. 3. But the rule of reason does not impose a distinct burden in vertical cases. Moreover, as the district court found, the NDPs are "[u]nlike most vertical distribution agreements between manufacturers/ suppliers or dealers/distributors." Op. 34. They "do not purport to restrain *intrabrand* competition" among Amex-accepting merchants in order to promote interbrand competition among GPCC networks, but rather "admittedly have the primary effect of restraining one form of *interbrand* competition among the GPCC card networks." *Id.* (emphases added); *see also id.* at 100-07. Like the horizontal agreements Amex holds up for contrast, the NDPs restrain "the way in which [the networks] will compete with one another." *NCAA*, 468 U.S. at 99. And the NDPs do so for all GPCC transactions at over 3 million merchants, even when the customer does not intend to use Amex. Op. 30.

Amex argues that a *prima facie* case requires quantifying the bottom-line "consumer welfare impact of the NDPs." Mot. 10-12. But the Supreme Court has made clear that no separate quantification of consumer welfare impact is required because harm to consumer welfare is inferred from proof of harm to the competitive process. As the Court has explained, the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions," not on whether the result of that competition "is good or bad" for consumers. *Professional Engineers*, 435 U.S. at 688, 695. The Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). When the evidence shows that "competition was actually suppressed," the Supreme Court has held a restraint unlawful without specific evidence of higher prices or other consumer injury. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 455, 461-62 (1986).[2]

In any event, Plaintiffs did prove higher fees marketwide to the relevant consumer. As the district court found, the "relevant consumer" of network services

[2] Amex misrepresents the district court's analysis in *Visa*. Mot. 11 n.3. The court noted that eliminating the restraints would "increase competition and consumer welfare," *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 383 (S.D.N.Y. 2001), but did not, as Amex contends, engage in an "overall" consumer welfare analysis. The court's reference to "consumer welfare" merely reflects the Sherman Act's premise that competition benefits consumers.

is merchants, not cardholders. Op. 46, 49. And Plaintiffs did prove that Amex's merchant fee increases "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders, and resulted in a higher net price." Op. 112. Plaintiffs did not, as Amex suggests, additionally have to prove the "two-sided price . . . account[ing] for the value or cost of the rewards paid to [Amex] cardholders." Mot. 11.

3. Amex's challenges to the district court's finding that it has market power, Mot. 13-15, also fail. The district court followed this Court's "roadmap" in *Visa*, Op. 66, and found that Amex has market power in network services because of its significant market share, high barriers to entry, and numerous price increases without significant merchant attrition. *See* pp. 4-5, *supra.* Amex does not show this finding is clearly erroneous. *See generally Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990) ("market power" is "a factual matter within the purview of the fact-finder").

Amex suggests that, because its market share is "just 26.4%," it cannot possess significant market power as a matter of law. Mot. 13. But that share equals MasterCard's 26% share in *Visa*, where this Court held that it "separately" had market power in network services. 344 F.3d at 239-40. And the fact that a firm's share "falls below some arbitrary threshold cannot disprove allegations of market power without reference to the other competitive dynamics at play." Op. 68 n.23;

cf. Broadway Delivery Corp. v. United Parcel Serv., Inc., 651 F.2d 122, 126-30 (2d Cir. 1981) (rejecting a minimum market share for monopoly power).

Moreover, the district court found that Amex's 26.4% market share understates its market power, because cardholder insistence on using Amex amplifies its ability to raise merchant fees. Op. 66-67.[3] Indeed, Amex imposed "at least twenty separate price increases" on merchants that accounted for 65% of its annual charge volume, resulting in $1.3 billion in incremental pre-tax income, without significant numbers of merchants canceling acceptance. *Id.* at 78-83. Insistent customers forced even a large merchant like Walgreens to "capitulate[]" to Amex on price and other terms. *Id.* at 76.

Amex argues that cardholder insistence cannot be a source of durable market power because Amex must invest in cardholder rewards to maintain it. Mot. 14. But firms frequently must pay to maintain advantages over new entrants or incumbents, and Amex cites no authority indicating "that market power is not durable if its maintenance requires continual and replicable investment by the

[3] In *Visa*, this Court found that merchants "could not refuse to accept payment by Visa or MasterCard, even if faced with significant price increases, because of customer preference," 344 F.3d at 240, which is what Amex calls "insistence." Amex argues that this finding in *Visa* derives from those networks' "ubiquity," which it lacks, Mot. 14 n.5, but cites nothing in *Visa* suggesting that this Court considered "ubiquity" central to the finding. The district court found that, even without ubiquity, Amex was able to leverage its high level of cardholder insistence when negotiating merchant fees. Op. 74-75.

defendant firm." Op. 78.[4] And there is no basis to believe that Amex will discontinue rewards.

Finally, Amex mistakenly claims that the district court's "market power and competitive effects findings hinge on its conclusion that Amex's" fees are "supracompetitive." Mot. 14-15. In finding that Amex had market power, the court properly relied on several forms of evidence, including that Amex increased prices with no significant merchant attrition. Op. 67, 79-83. The cases cited by Amex, Mot. 15, suggest that *high* prices are not enough to prove market power. They did not address proffered evidence of significant price *increases* or suggest that the ability to impose significant price increases without losing substantial business is not evidence of market power. *Cf. Visa*, 344 F.3d at 240 (finding market power in part because "despite recent increases in both networks' interchange fees, no merchant had discontinued acceptance of their cards").

II. Amex Has Not Established Irreparable Harm

Amex argues that a stay is necessary to prevent it from losing market share. Mot. 16. But at trial, Amex "presented no expert testimony, financial analysis, or other direct evidence establishing that without its NDPs it will, in fact, be unable to

[4] The district court correctly held that the durability requirement in the case law "speaks to whether a new entrant or other market forces could quickly bring the defendant's exercise of power to an end," and that "the durability of [Amex's market] power is ensured by the sustained high barriers to entry in the network services market." Op. 77-78.

adapt its business to a more competitive market and will instead cease to be an effective competitor in the GPCC industry." Op. 137. And now, it cites only a few documents concerning its loss of market share after the 1990s "We Prefer Visa" campaign. Mot. 16-17. But Amex disregards the district court's findings that Amex "has survived (and in some ways prospered during) merchant steering reforms in other jurisdictions." Stay Op. 13. Amex "has already identified ways to mitigate potential merchant steering, such as engaging with merchants to better explain the benefits of accepting [Amex], targeting high-visibility 'Anchor' merchants with its own steering programs, and reducing the network's [fee] in industries where steering is more likely to occur." *Id*.

Amex's claim that it will lose market share is thus too speculative to support a stay. *See Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011) (movant must prove irreparable injury that is "not remote or speculative but actual and imminent") (internal quotation marks omitted).

Amex wrongly suggests that the rationale for a stay here is the same as in *Visa*. Mot. 18. In *Visa*, absent a stay, banks could start issuing non-Visa and non-MasterCard credit cards to consumers, which was "potentially irreversible" even if the Second Circuit reversed the district court's decision. *United States v. Visa U.S.A., Inc.*, No. 98-cv-7076, 2002 WL 638537, at *1 (S.D.N.Y. Feb. 7, 2002). There are no comparable consequences of the injunction here. Amex need not

renegotiate contracts with its merchants during the appeal, nor change anything in its relationship with its customers in the card issuance market. Stay Op. 14. Rather, Amex simply must stop enforcing its NDPs to prevent merchant steering. *Id.*; Injunction § IV.B.

Of course, absent a stay, Amex will face increased competition. But as Amex argued in *Visa*, "[i]ncreased competition is not harm; it is one of the core values that the antitrust laws promote. The answer to increased competition is . . . to provide competition in return," not "a stay pending appeal." Mem. of American Express as Amicus Curiae in Opp'n to Defs.' Mots. for a Stay Pending Appeal, *United States v. Visa U.S.A., Inc.*, No. 98-cv-7076 (S.D.N.Y. Jan. 14, 2002), *available at* 2002 WL 32496022.

Contrary to Amex's suggestion, Mot. 18, this Court need not disregard the district court's extensive factual findings and credibility determinations made after voluminous discovery and a lengthy trial. To the contrary, this Court is entitled to give little or no weight to Amex's "self-interested" statements without adequate evidentiary support, just as the court did below. Op. 88.

III. Harm to Merchants and the Public from Issuing a Stay Outweighs Any Harm to Amex

A stay would cause "significant, continued harm to merchants and to other members of the public," which "weighs strongly" against it. Stay Op. 3, 15. By prohibiting merchants from "directing transactions to other networks," Amex's

NDPs have allowed it to raise merchant fees virtually unchecked, Op. 111-13, leading to "dramatically" higher merchant fees, *id.* at 6. Many merchants testified at trial that were they "able to do so, they would have attempted to steer customers away from [Amex] to blunt the effect of Amex's price hikes." *Id.* at 112 (citing Tr. 2418:3-17); *see id.* at 122-23 (citing testimony from several merchants regarding their desire to steer). And, post-trial, merchants expressed their strong desire to introduce competition immediately into the market. Stay Op. 17 (acknowledging that, "[o]nce the Injunction becomes effective, Walgreens, Kroger, Spirit, Burlington, and other merchants are prepared to take steps to use their experience with steering, and with generating competition through steering, to achieve more competitive prices for their credit card acceptance").[5]

Amex asserts that the relief ordered by the district court "will weaken competition and harm consumers." Mot. 19. But this assertion presupposes that the district court's factual findings of how competition works in the network services market are wrong. Amex is not entitled to a presumption of error in the face of the extensive trial record, the district court's detailed rule-of-reason analysis, and uncontradicted merchant testimony about the anticompetitive harm inflicted by

[5] Amex mistakenly suggests that damages actions render harms to merchants and the public fully reparable. Mot. 19. Full recovery for many merchants may be impractical because of binding arbitration clauses. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). And damages actions for many retail customers may be unavailable. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

NDPs. The district court properly rejected Amex's contention that allowing merchant steering would subject it to an undesirable form of competition, relying on well-established antitrust precedent that "[t]he statutory policy underlying the Sherman Act 'precludes inquiry into the question whether competition is good or bad.'" Op. 105-06; *see also* p. 13, *supra*.

Contrary to Amex's claim (Mot. 19), the length of the NDPs' existence and of Plaintiffs' investigation does not support a stay. That the merchants and the public have already suffered harm for an extended period of time does not justify "mak[ing] this Court an instrument for further frustrating instead of promoting the aim of the [antitrust laws]." Stay Op. 18 (quoting *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1248, 1251 (S.D.N.Y. 1992)). "[I]f anything, the deliberateness of the parties' approach to this case (and the full trial on the merits, including the court's resolution of many contested factual issues) supports a finding that a stay pending appeal is not appropriate." *Id.* at 16. Enjoining the NDPs is necessary so they do not "continue to negatively, and substantially, affect merchants [and their customers] across the country." *Id.* at 18. Amex's "[p]rivate equities do not outweigh effective enforcement of the antitrust laws." *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981).

CONCLUSION

The Court should deny Amex's motion for a stay pending appeal.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman Font.

June 5, 2015 /s/ Nickolai G. Levin
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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on June 5, 2015, I electronically filed the foregoing Opposition of Plaintiffs-Appellees to Defendants-Appellants' Emergency Motion for a Stay Pending Appeal with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent three copies to the Clerk of the Court by FedEx Overnight Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

June 5, 2015 /s/ Nickolai G. Levin
Attorney